Office - Supreme Court, U.S.
FILED
JAN 13 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR AMICUS CURIAE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC. IN SUPPORT OF RESPONDENTS

FORREST A. HAINLINE III
Counsel of Record
J. LAURENT SCHARFF
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566
Attorneys for Amicus Curiae Association of Independent Television Stations, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE NCAA POSSESSES MARKET POWER	4
A. Broadcasters, Not Advertisers, Are the Purchasers of NCAA's Football Product	4
B. For Broadcasters, There Is No Effective Alternative to NCAA Football During the Time It Is Aired	4
II. THE NCAA TELEVISION PLAN RESTRICTS COMPETITION	7
A. The NCAA Plan Is Unlawful Because, Unlike *BMI*, NCAA Members Are Not Free To Sell Their Football Games Outside the NCAA Package	7
B. The NCAA Plan Restricts Output	9
C. The NCAA Plan Forecloses the Networks' Only Competitors from a Unique Product Market and Extends the Dominance of the Major Networks	12
D. There Is No Necessary or Logical Relationship Between NCAA's Stated Justifications and the Plan's Restrictions	12
CONCLUSION	15

TABLE OF AUTHORITIES

Cases Page

American Federation of Tobacco Growers v. *Neal*, 183 F.2d 869 (4th Cir. 1950) 12
Associated Press v. *United States*, 326 U.S. 1 (1945) 12
Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ..... *passim*
Gamco, Inc. v. *Providence Fruit & Produce Building*, 194 F.2d 484 (1st Cir. 1952), *cert. denied*, 344 U.S. 817 (1952) 12
National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 9
Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973) 12
United States v. *Krasnov*, 143 F.Supp. 184 (E.D. Pa. 1956), *aff'd per curiam*, 355 U.S. 5 (1957) .. 12
United States v. *Sealy, Inc.*, 388 U.S. 350 (1967) .. 9
United States v. *Terminal Railroad Association*, 224 U.S. 383 (1912) 12
United States v. *Topco Associates*, 405 U.S. 596 (1972) 9
White Motor Co. v. *United States*, 372 U.S. 253 (1963) 15

Statutes

15 U.S.C. § 1293 5

Other Authorities

Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do Sealy and Topco Logically Survive Sylvania and Broadcast Music?*, 66 Va. L. Rev. 879 (1980) 9, 15
Time, Oct. 25, 1982, at 66 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-271

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR AMICUS CURIAE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

INTV is a national association representing some 103 independent television broadcast stations, that is, stations not affiliated with any national network.[1] Because inde-

[1] The following abbreviations will be used throughout:
"INTV" is the Association of Independent Television Stations, Inc.;

pendent stations do not receive programs from a network, they must either purchase or produce programming to fill their entire broadcast day. Independent stations are direct competitors of broadcast and cable television outlets for ABC, CBS and Turner, the exclusive participants in the NCAA Television Plan. The NCAA Plan effectively prevents colleges and universities from selling television rights to their football games to independent stations, and prevents independent stations from purchasing and broadcasting such games in competition with the networks.

STATEMENT

This case involves the sale of the telecasting rights to college football games. NCAA football is the product which INTV member stations wish to buy from schools such as Oklahoma and Georgia, but because of the NCAA Television Plan, cannot. The purchasers at issue here are television stations. Stations use programs to attract viewers and advertising dollars. Stations excluded from college football cannot nearly as effectively attract viewers or advertisers during its broadcast.

"NCAA" is the petitioner, National Collegiate Athletic Association;

"Oklahoma" is respondent The Board of Regents of the University of Oklahoma; "Georgia" is respondent the University of Georgia Athletic Association;

"NCAA Television Plan," "NCAA Plan" and "Television Plan" refer to NCAA's set of rules governing permissible television coverage of NCAA college football games;

The Brief for the Petitioner is referred to as "NCAA Br.";

References to the Joint Appendix are designated "J.A." followed by an appropriate page number;

References to the District Court opinion shall be to the Petition's appendix and designated "D.C.".

SUMMARY OF ARGUMENT

The NCAA possesses and abuses market power. The relevant market, which NCAA dominates, is that for television rights to live college football played on Saturday afternoon. The purchasers of this product are broadcasters. If broadcasters are deprived of fair access to live college football they have no product which can as profitably be sold during that time slot. The lost opportunity cannot be made up at another time.

Live college football attracts a large audience of the most desirable demographic composition. Advertisers are willing to pay a premium to reach it. In order to attract advertisers for this unique product, broadcasters must have access to live college football during its time of play.

The NCAA Television Plan has one purpose and effect: to restrict output of a unique product. Unlike the restraints in this Court's *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), NCAA does not permit its members to sell broadcast rights to their football games outside the NCAA Plan. The Plan's restrictions of output have no logical relationship to its asserted benefits, and exist solely to extend NCAA's dominance over a unique product and further the dominance of the major networks in a particular broadcast time period.

ARGUMENT

I. THE NCAA POSSESSES MARKET POWER.

Both courts below correctly held that the relevant market is television coverage of live college football, which NCAA dominates. NCAA's dominance makes the restraints of its television plan abusive and unreasonable. NCAA concedes:

> (1) for many viewers, there is no substitute for college football and thus networks must show college football, and (2) advertisers pay more, per viewer, to reach these viewers than they pay for television viewers on average. . . . we do not dispute these findings by the lower courts . . . (NCAA Br. 33).

Nevertheless, NCAA argues for a never-defined market different from live television coverage of college football. The argument is based upon a single assertion, "advertisers can switch" (NCAA Br. 38), which completely ignores the nature of the broadcasting business and distorts rational antitrust analysis of the NCAA Television Plan.

A. Broadcasters, Not Advertisers, Are the Purchasers of NCAA's Football Product.

Advertisers do not purchase football programming; broadcasters do, although the NCAA plan effectively precludes INTV member stations and other television stations from such purchase opportunities. Broadcasters are licensed to use a portion of the radio-magnetic spectrum to present programming; they sell time during their broadcast day to advertisers. If time cannot be profitably sold, there is no way for a broadcaster to make up that lost opportunity at another time. Whether or not "advertisers can switch," broadcasters cannot switch.

B. For Broadcasters, There Is No Effective Alternative to NCAA Football During the Time It Is Aired.

NCAA's argument distorts and ignores the evidence on which the District Court based its market definition.

This record establishes that, for broadcasters, there is no economically effective alternative programming available when live college football is aired.

The record before the district court shows what every advertiser of beer or automobiles knows—that live college football television attracts an audience with a heavy concentration of men, including a large proportion of college-educated and higher-income men. J.A. 590-605 (testimony of Ira Horowitz). Saturday afternoon, when college football is primarily played, is one of the few time periods during the week when such an audience is available. Paul Klein, one of NCAA's experts, testified that "Saturday afternoons, it [college football] is uniquely positioned, that's when the games are played, and that's when the audience is available." J.A. 787.

Not only does live college football attract a large audience of unique composition, the record shows that advertisers are willing to pay a premium to reach it. The cost per thousand viewers for advertising time on a Saturday afternoon college football game is approximately two and a half times the cost per thousand viewers for advertising on other programming generally. J.A. 511-12 (testimony of James C. Koch). Indeed, advertising time on college football sells for 75 percent more per thousand homes than advertising time on major league baseball programs. J.A. 602 (testimony of Ira Horowitz).

Programming which might compete effectively with college football on Saturday is not available. By law, professional football is unavailable for Saturday telecasting. 15 U.S.C. § 1293. Other Saturday programming is simply not competitive with college football. That the potential profit to be derived from any other available program on Saturday is so much less than from college football is graphically demonstrated, as the district court pointed out (D.C. 72a), by the decision of the CBS network, when

only ABC carried college football, to simply offer no programming to its affiliates on Saturday afternoon.[2]

The change from the 1978-81 NCAA contract to the 1982-85 arrangement also proved the singular value which college football has for broadcasters. In 1978-81, ABC had the exclusive rights to televise NCAA football, enabling it in NCAA's view (NCAA Br. at 27-29) to promote "brand identification" and a "series." In 1982, however, NCAA divided the program among two networks and Turner Broadcasting System, a "superstation" whose signal is widely distributed over cable television systems. Thus, the 1982-85 contract removed ABC's exclusively while also drastically raising the price which ABC would have to pay. D.C. 57a-61a. Yet ABC willingly agreed to the new, significantly less favorable arrangement.

If a television broadcaster wants to maximize its profits on Saturday, it must put on college football. Whether it could obtain similar profits on other days from other programs is irrelevant, for a broadcaster cannot substitute for the lost opportunities on Saturday. The conclusion that live college football television is the relevant product market must therefore be affirmed, not because college football is what NCAA and its members have to sell, but because it is what programming customers—broadcasters—need to buy for Saturday afternoon, the time it is primarily available.

Because live college football television is a distinctive product category constituting its own relevant product market, independent broadcasters are harmed by the

---

[2] Another indication of football's unique attractiveness was the inability of many advertisers to find effective substitutes for professional football programs during the National Football League strike, resulting in lower revenues for broadcasters and dissatisfied advertisers. See "Thrown for a Mighty Big Loss," *Time*, Oct. 25, 1982, at 66.

NCAA Plan which almost entirely deprives them of access to it, even though many schools would sell their rights for television coverage if the NCAA would permit them to do so (D.C. 91a).

II. THE NCAA TELEVISION PLAN RESTRICTS COMPETITION.

Both courts below properly found the NCAA Television Plan to violate the antitrust laws under *per se* and rule of reason standards. NCAA not only possesses market power, it abuses it, restricting competition through its Television Plan.

A. The NCAA Plan Is Unlawful Because, Unlike *BMI*, NCAA Members Are Not Free To Sell Their Football Games Outside the NCAA Package.

NCAA contends that the provisions of its Television Plan are reasonably ancillary to its other activities, and promote competition. NCAA analogizes its plan to the blanket licensing arrangements upheld against a *per se* challenge in *Broadcast Music, Inc.* v. *Columbia Broadcasting Systems, Inc.*, 441 U.S. 1 (1979) ("*BMI*"). On the contrary, *BMI* shows precisely why the NCAA Plan violates the law. ASCAP members granted "ASCAP only nonexclusive rights to license their works for public performance. Members, therefore, retain the rights to license the use of their compositions for other purposes." 441 U.S. 1, 11.

NCAA's Plan does not meet *BMI's* standards. Its attorney, Professor Easterbrook, argued *BMI* before this Court; in the brief for United States as *amicus curiae*, he wrote:

> But an agreement among competitors to market a product or service fundamentally different from anything any of them individually can market has never been found to be price fixing under circumstances where, as here, *there is no agreement not to sell the*

> *individual products or services at any price the competitors choose*, and where the project is not a disguise for price fixing.
>
> • • • •
>
> *A different question would be presented if ASCAP's members agreed that* they would set the prices at which they could individually sell licenses, or that *they would only sell through the blanket license. Such agreements would not be essential to the enterprise of marketing the blanket license.*

(Brief for the United States as *Amicus Curiae*, *BMI*, Nos. 77-1578 and 77-1583, pp. 9, 11, emphasis added).

BMI placed no restrictions on the right of composers and users to make agreements outside of the pooled arrangement; NCAA, by contrast, in its "exception telecast" rules, places limits on non-series telecasts far more stringent than those on its own series and totally forbids any other sale of television rights. Further, as the Court pointed out, 441 U.S. at 18-19, the commerce being restrained in *BMI* existed solely because of federal copyright law and Congress appeared to have contemplated the sale of blanket licenses in the Copyright Act. College football television is not dependent on any similar federal construct; nor does NCAA point to any congressional mandate for its restrictive licensing arrangements. NCAA members may only sell through NCAA's blanket plan. NCAA members may not sell, and INTV members are unable to buy, individual football games for broadcast except under the severe and illogical restrictions of the exception telecast rules.

The *BMI* arrangements were found to be essential to the conduct of its business because the market there involved thousands of composers and users and millions of compositions and individual transactions. As a practical matter, the Court found composers had no alternative to a joint marketing arrangement which could also detect

copyright violators. There is no similar practical necessity for the joint marketing of college football games. Networks and local stations clearly could and would freely negotiate with individual schools or conferences for the right to broadcast games; such arrangements are commonplace in college basketball (D.C. 47a-48a). Of course, in the few instances where exception telecasts are permitted by NCAA, such negotiations already occur for football games. The scale of the individual transactions involved in the sale of college football television rights is much greater than most of the music licensing transactions considered in *BMI*, and the number of transactions involved in football is much less than with music performance rights. Thus, there is no necessity for NCAA to serve as the exclusive bargaining agent for college football television.

B. The NCAA Plan Restricts Output.

The district court held that the NCAA Television Plan was a *per se* violation of the Sherman Act, and alternatively, that its provisions were illegal if analyzed under the rule of reason. (D.C. 100a, 104a, 115a); *cf. National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 687-92 (1978). NCAA argues that, as a joint venture, its Television Plan must be judged by the rule of reason. NCAA Br. at 10-14.[3] Regardless of whether the plan contains naked horizontal restraints sufficient to invoke *per se* condemnation, or the restraints are adjudged sufficiently unrelated to a legitimate goal so as to make them unreasonable, the findings of illegality must be upheld. *See* Louis, *Restraints Ancillary to Joint Ventures*

[3] NCAA attempts not only to escape *per se* analysis, but the reach of the antitrust laws altogether, by the mere labelling of its activities a "joint venture." Sealy was a "joint venture" whose joint activities violated the antitrust laws *per se*. *United States* v. *Sealy, Inc.*, 388 U.S. 350, 351, 354-58 (1967). Topco was another joint venture whose practices constituted a *per se* violation. *United States* v. *Topco Associates*, 405 U.S. 596 (1972).

and Licensing Agreements: Do Sealy and Topco Logically Survive Sylvania and Broadcast Music?, 66 Va. L. Rev. 879, 883, 894 (1980). Examination of the restrictions in the NCAA Plan, in particular the rules for exception telecasts, reveals that the true nature of the NCAA scheme is to restrict output and suppress competition.

The NCAA Plan, by granting virtually exclusive rights to the ABC, CBS and Turner networks to televise college football, restricts output by foreclosing in most instances the purchase by other broadcasters of rights to televise games not chosen by those networks, even if all schools involved are willing to have their games broadcast. Under Article 16 of the 1982-85 NCAA Plan, an exception telecast (outside of the network series) can generally be presented in the home team's television market only if the game is sold out, and in the visiting team's television market only if the game is sold out or played more than 400 miles away from home. Even if these requirements are met, exception telecasts are allowed only if no "appreciable damage" will be done to a conflicting game. "Appreciable damage" to a conflicting game is presumed if a non-sellout game is scheduled within three hours of the "exception" game in a 120 mile radius of a VHF television station presenting the game or a 45 mile radius of a UHF station.[4] In addition, "appreciable damage" can be created from retransmission of a broadcast signal by cable systems, regardless of whether the playing school or the broadcaster has any power to stop it. The Plan explicitly reserves to NCAA all power to determine when "appreciable damage" may occur, stating that its Television Committee "will not accept declarations of lack of

---

[4] There are other "special exception" provisions for Division I schools, but during 1981 only four games were telecast under those provisions, so their effect in permitting telecasts must be regarded as *de minimis*. Report of the 1981 NCAA Football Television Committee 50-51 (January 1982) [hereinafter 1981 NCAA Report], J.A. 228-231.

attendance damage by the institutions participating in a conflicting game." 1982-85 NCAA Football Television Plan 50; J.A. 71.

The record establishes that the exception telecast limitations effectively prevent individual colleges and television stations from presenting many college football games. As an initial matter, "exception" games are virtually limited to a college's home market. Thus, only Austin stations in Texas could present University of Texas games unless the competing school also came from Texas. For other schools, the sellout requirement bars televising of local games. For example, USC almost never sells out its stadium which seats almost 100,000 fans. Even though USC would permit television coverage of its games, the NCAA forbids it. J.A. 581-82 (testimony of John Mohr). Altogether, only 65 telecasts were permitted in 1981 under the two major "exception" rules. 1981 NCAA Report, J.A. 228-231. There can be no doubt, therefore, that the NCAA rules inhibit the sale of television rights for college football games, largely restricting telecasts of live college football to the NCAA series games on network television.

The restriction of output crucial to the NCAA Plan distinguishes it from the licensing arrangements considered in *BMI*. Although NCAA strictly limits the number of games which may be televised and the number of television appearances which a school may have, *BMI* in no way limited the number of compositions which could be created and played or the number of times any composition could be used. Thus, while *BMI's* arrangements did set a blanket price for all compositions, there was no effort to depress total output or to restrict competition; while *BMI* sought to maximize the use of its members' product, the NCAA Plan artificially restricts use of its members' product.

C. The NCAA Plan Forecloses the Networks' Only Competitors from a Unique Product Market and Extends the Dominance of the Major Networks.

NCAA defends its plan in part on the ground that the particular networks support it (Br. Pet. 47, 48). Of course they do. The NCAA forecloses the networks' only competitors from access to a unique and desirable product, live college football. In none of the long-term contract cases NCAA cites (NCAA Br. 47) was a unique product, such as live college football, tied up.

A joint venturer (assuming that is what NCAA is) which controls a scarce resource or unique product has a duty to provide all competitor purchasers with access to the scarce product. *United States* v. *Terminal Railroad Association*, 224 U.S. 383 (1912); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *American Federation of Tobacco Growers* v. *Neal*, 183 F.2d 869 (4th Cir. 1950); *Gamco, Inc.* v. *Providence Fruit & Produce Building*, 194 F.2d 484 (1st Cir. 1952), *cert. denied*, 344 U.S. 817 (1952); *United States* v. *Krasnov*, 143 F.Supp. 184 (E.D.Pa. 1956), *aff'd per curiam*, 355 U.S. 5 (1957).

Arrangements such as the NCAA Plan are lawful only where, as in *BMI*, true alternatives under the Plan are available to competitive purchasers.

D. There Is No Necessary or Logical Relationship Between NCAA's Stated Justifications and the Plan's Restrictions.

NCAA argues that its restrictions are essential to the sale of college football television rights. Both courts below, however, correctly found that none were adequate to justify the NCAA Plan's gross restriction of competition.

NCAA asserts that the limits on the number of series games and the restriction of "exception" games to situa-

tions where all local games (regardless of whether the schools involved are NCAA members) are sold out are necessary to promote live attendance at college games. Both the Television Plan itself and the attendance records of NCAA schools belie this assertion. In contrast to the overwhelming care taken through television blackouts for the stated purpose of preserving attendance when exception telecasts are at issue, the NCAA Plan *prohibits* blackouts of NCAA network series games "in the area in which the game is played," without regard to whether the game being televised or any other area game is sold out. Moreover, the mileage rules for determining "appreciable damage" from exception telecasts far exceed the normal propagation of a television signal, and the NCAA enforces its ban on televising other games even if all schools within the "appreciable damage" area waive objections to a telecast. It is clear from these facts that the NCAA is not motivated to adopt these restrictions by any concern with preserving attendance at local games, but is actually bent on minimizing the number of exception telecasts competing with the NCAA-network series of games.

Furthermore, there is no basis for NCAA's concern over the effect of television on game attendance in view of the fact that while the number of televised NCAA games has been increasing, attendance at college football games has increased in all but one of the 28 seasons from 1954-81. 1981 NCAA Report J.A. 235; *see* J.A. 514-16 (testimony of James Koch). NCAA's "concern" is illusory, since under the Television Plan, college football is televised on the networks every Saturday during the football season. The effect of the Plan is not to "preserve" live attendance from television competition, but to foreclose competition within the market of televised games. If the NCAA restrictions were removed, any college which feared an adverse impact on attendance could re-

fuse to have its games broadcast. Thus, the interests of individual colleges would be better protected in the absence of the NCAA Plan.

NCAA's "on-the-field balance" justification (NCAA Br. 20) proves the correctness of the lower courts' findings. NCAA acknowledges:

> . . . the increase in the number of teams shown on national or regional broadcasts puts the teams on more competitive footing in recruiting new players and financing their programs (NCAA Br. 20).

NCAA's Television Plan, however, restricts output and reduces the number of televised football games. The Plan thereby adversely affects the very increase in exposure of college football teams that NCAA recognizes is financially healthy and pro-competitive. On the evidence before it, the District Court found that "many more games would have been broadcast locally" were it not for the NCAA Plan (D.C. 59a).

NCAA also asserts that its Television Plan is necessary to promote "brand identification" so that the networks can promote NCAA football as a series. NCAA Br. at 22-25. There is no reason why a network which desired to promote a series of college games could not on its own negotiate for a number of games and then promote them as a package, even as "NCAA Football" if the NCAA wished to license the use of its name. NCAA's claim that its Television Plan is essential to college football must also be viewed in light of the absence of similar restrictive practices for college basketball—an absence which has had no apparent deleterious effect on either college basketball or the NCAA (D.C. 47a-48a).

Contrary to NCAA's arguments, therefore, the restrictions on output inherent in the Television Plan are not essential or even rationally connected to the promotion and sale of television rights for college football or the avowed beneficent purposes of the NCAA. Instead, their only purpose appears to be to restrict the output of col-

lege football television rights, depriving broadcasters other than NCAA's contractual partners of access to this valuable market. Restrictions which decrease competition, as NCAA's certainly do, and are not shown to be essential to the conduct of the business in question cannot be deemed reasonable. *See White Motor Co.* v. *United States*, 372 U.S. 253, 273 (1963) (Brennan, J., concurring); Louis, *supra* p. 10, at 883.

CONCLUSION

The NCAA Plan has one purpose and effect: to artificially restrict the output of live television broadcasts of college football. The restrictions have no necessary or even logical relationship to their stated justifications.

Unless colleges are to be given an exemption from the antitrust laws now enjoyed by no other professional group, including doctors and lawyers, the decision of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

FORREST A. HAINLINE III
Counsel of Record
J. LAURENT SCHARFF
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566
Attorneys for Amicus Curiae Association of Independent Television Stations, Inc.